

LISA GOLLIN EVANS (MA SB # 200730)
(Admitted *Pro Hac Vice*)
Earthjustice
21 Ocean Avenue
Marblehead, MA 01945
(781) 631-4119
levans@earthjustice.org

THE HONORABLE WILLIAM H. ALSUP

JAN HASSELMAN (WSB #29107)
(Admitted *Pro Hac Vice*)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
jhasselman@earthjustice.org

*Attorneys for Plaintiffs Sierra Club, Great
Basin Resource Watch, Amigos Bravos, and
Idaho Conservation League*

GREGORY C. LOARIE (CSB #215859)
Earthjustice
426 - 17th Street, 5th Floor
Oakland, CA 94612
(510) 550-6725
(510) 550-6749 [FAX]
gloarie@earthjustice.org

Local Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SIERRA CLUB, et al.,)	Case No. 3:08-cv-01409-WHA
)	
Plaintiffs,)	
)	
v.)	JOINT CASE MANAGEMENT
)	STATEMENT
STEPHEN JOHNSON, et al.,)	
)	
Defendants,)	
)	
and)	
)	
SUPERFUND SETTLEMENTS PROJECT, et al.,)	
)	
Defendant-Intervenors.)	

Pursuant to the Court's March 12, 2008 Order Setting Initial Case Management Conference and ADR Deadlines, as amended by the Court's June 2, 2008 Order Granting in Part Stipulation to Postpone, Plaintiffs, Sierra Club, et al., Federal Defendants, Stephen Johnson, et al., and Defendant-Intervenors, Superfund Settlements Project, et al., submit this joint case management statement:

1. Jurisdiction and Service.

Plaintiffs have invoked this Court's jurisdiction under 42 U.S.C. § 9659(a)(2) (citizen suit provision of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 28 U.S.C. §§ 1331 and 1361 (action arising under the laws of the United States), 28 U.S.C. § 2201 and § 2002 (declaratory judgments), and 5 U.S.C. § 706 (Administrative Procedure Act ("APA")). Plaintiffs served Federal Defendants with their Complaint on March 20, 2008. Federal Defendants assert that this Court lacks jurisdiction over the claims alleged in Plaintiffs' Complaint and that venue in this Court is improper and have moved to dismiss on those grounds. Plaintiffs assert that venue in this Court is proper and have opposed the motion to dismiss. No additional parties need to be served.

2. Brief Chronology of Facts and Statement of Principal Factual Issues.

This lawsuit is an action for declaratory and injunctive relief pursuant to CERCLA and the APA. Plaintiffs allege that CERCLA requires Federal Defendants Johnson and Peters to promulgate regulations that would require certain facilities that produce, treat, store, transport or dispose of hazardous substances to establish and maintain evidence of financial responsibility. Specifically, Plaintiffs allege that CERCLA § 108(b) required Federal Defendants to: (a) publish notice of priority categories for such regulations no later than December 1983; (b) promulgate the regulations themselves beginning in December 1985; and (c) impose financial assurance requirements as quickly as could reasonably be achieved, but in no event later than four years after promulgation. 42 U.S.C. § 9608(b)(1) and (3). Plaintiffs allege that Federal Defendants have taken none of these steps. Plaintiffs brought this action to compel Federal Defendants to follow the alleged requirements of CERCLA and promulgate financial assurance regulations. The parties

believe that there are no factual issues in dispute concerning the allegations in Paragraph 3 infra and that the legal issues in this case can be resolved on motions for summary judgment.

3. Disputed Legal Issues.

The principal legal issues, in addition to the jurisdiction and venue issues raised in Federal Defendants' pending motion to dismiss, include:

a. Whether Federal Defendants violated CERCLA by allegedly failing to identify classes of facilities for which requirements will be first developed and publish notification of such identification in the Federal Register by December 11, 1983.

b. Whether Federal Defendants violated CERCLA by allegedly failing to promulgate requirements that classes of facilities establish and maintain evidence of financial responsibility.

c. Whether Federal Defendants violated CERCLA by allegedly failing to impose such requirements as quickly as could reasonably be achieved, but in no event later than four years after promulgation.

d. Whether Federal Defendants violated the APA by allegedly failing to prioritize, promulgate and implement regulations as required by CERCLA § 108(b), thereby unlawfully withholding or unreasonably delaying agency action.

4. Motions.

Plaintiffs' Complaint was filed on March 11, 2008. On April 10, 2008, Defendant-Intervenors filed a motion to intervene, which was granted on May 23, 2008. The parties anticipate that an additional, similar motion to intervene may be filed in the near future. Federal Defendants filed a motion to dismiss for lack of subject matter jurisdiction and improper venue on May 16, 2008. Plaintiffs opposed the motion on June 12, 2008, and Federal Defendants filed a reply in support of the motion on June 19, 2008. A hearing on the motion is scheduled for July 3, 2008 at 8:00 a.m.

In the event the motion to dismiss is denied, the parties have agreed to a schedule for

1 motions for summary judgment on the legal issues presented in the case. If Plaintiffs prevail on
2 their motion for summary judgment, the parties have agreed to engage in private settlement
3 discussions to try to resolve the injunctive relief and attorneys' fees issues. See Paragraphs 12, 15
4 and 16, infra.

5 5. Amendment of Pleadings.

6 The parties at this time do not anticipate amending their pleadings, except as may be
7 necessary to reflect any additional intervenors.

8 6. Evidence Preservation.

9 See Paragraph 7, infra.

10 7. Disclosures.

11 This case involves review of an agency's alleged failure to take action allegedly required by
12 law and can be resolved on motions for summary judgment. The parties have stipulated to waive
13 the initial disclosures required by Rule 26 and do not anticipate conducting discovery for the
14 summary judgment motions discussed in Paragraph 16, infra.

15 8. Discovery.

16 See Paragraph 7, supra.

17 9. Class Actions.

18 The parties do not seek certification as a class action.

19 10. Related Cases.

20 The parties are not aware of related cases.

21 11. Relief Sought.

22 Plaintiffs seek declaratory and injunctive relief in this case. Specifically, Plaintiffs seek a
23 declaratory judgment that Federal Defendants violated CERCLA and/or the APA by failing to
24 perform the alleged nondiscretionary duties set forth in CERCLA § 108(b). Plaintiffs further seek
25 to enjoin Federal Defendants to comply with the alleged nondiscretionary requirements of
26 CERCLA § 108(b), specifically to: (a) identify classes for which the financial responsibility
27

1 requirement would first be developed; (b) publish proposed regulations establishing requirements
2 that classes of facilities establish and maintain evidence of financial responsibility consistent with
3 the degree of risk associated with the production, treatment, transportation, storage or disposal of
4 hazardous substances; and (c) publish a final rule establishing requirements that classes of facilities
5 establish and maintain evidence of financial responsibility. Plaintiffs also seek recovery of litigation
6 costs and attorneys' fees.

7 12. Settlement and ADR.

8 The parties filed a Notice of Need for ADR Phone Conference on June 12, 2008. The
9 Plaintiffs believe that the nature of their claims and requested relief are such that settlement
10 discussions could lead to the relief sought by Plaintiffs. Federal Defendants and Defendant-
11 Intervenors, however, do not believe ADR is appropriate at this time. Instead, Federal Defendants
12 prefer to proceed with summary judgment briefing to allow them to assert jurisdictional defenses,
13 in addition to merits-based defenses. However, should Plaintiffs prevail on summary judgment, the
14 parties have agreed to engage in private settlement discussions in an attempt to resolve the
15 injunctive relief and attorneys' fees requested by Plaintiffs. The parties' ADR phone conference is
16 scheduled for July 1, 2008.

17 13. Consent to Magistrate Judge for All Purposes.

18 The parties respectfully do not consent to assignment to a magistrate judge.

19 14. Other References.

20 The parties do not believe this case is suitable for reference to binding arbitration, a special
21 master, or the Judicial Panel on Multidistrict Litigation.

22 15. Narrowing of Issues.

23 The parties believe that the legal issues presented in this case, including any further
24 jurisdictional defenses Federal Defendants may raise, can be resolved on motions to dismiss and for
25 summary judgment. Pursuant to Paragraph 12 supra and Paragraph 16 infra, the parties wish to
26 bifurcate the remedy and attorneys' fees issues from the motions for summary judgment.
27

1 16. Scheduling.

2 A. Filing of Answer.

3 In the event the Court denies Federal Defendants' motion to dismiss for lack of jurisdiction
4 and improper venue, Federal Defendants will file their Answer by July 31, 2008, and Defendant-
5 Intervenor will amend their Answer as they deem appropriate.

6 B. Merits Briefing.

7 All parties agree that the legal issues discussed in Paragraph 3 supra, including any defenses
8 that Federal Defendants may raise, can be resolved on motions for summary judgment and that no
9 discovery or trial schedules need be adopted. Accordingly, the parties propose the following
10 schedule as the most efficient and expeditious means for resolving those issues, which, for purposes
11 of the summary judgment motions below, are limited to (1) Plaintiffs' allegations that Federal
12 Defendants have violated CERCLA and the APA, as described in Paragraph 3 supra, and (2) any
13 jurisdictional defenses that Federal Defendants may raise:

14 September 4, 2008: Plaintiffs file their motion for summary judgment, not to exceed 35
15 pages;

16 October 16, 2008: Federal Defendants and Defendant-Intervenors file their oppositions
17 to Plaintiffs' motion for summary judgment and counter-motions,
18 each not to exceed 35 pages;

19 November 6, 2008: Plaintiffs file their reply in support of their motion for summary
20 judgment together with their opposition to Federal Defendants' and
21 Defendant-Intervenors' counter-motions, not to exceed 15 pages;

22 November 26, 2008: Federal Defendants and Defendant-Intervenors file their replies in
23 support of their counter-motions, each not to exceed 15 pages.

24 The parties request that the Court set the motions for summary judgment for hearing on
25 December 11, 2008 at 8:00 a.m., or as soon thereafter as the Court's schedule will allow.

26 C. Remedy and Attorneys' Fees.

27 In the event the Court grants Plaintiffs' motion for summary judgment, the parties have

1 agreed to engage in private settlement discussions to try to resolve the remedy and attorneys' fees
 2 requested by Plaintiffs. If agreement on these issues is not reached by the parties in 60 days, the
 3 parties will then file a supplemental case management statement setting forth a schedule for limited
 4 discovery on the remedy issue, if necessary, as well as motions for summary judgment on the
 5 remedy and attorneys' fees issues, or, if agreement on a schedule cannot be reached within 10 days
 6 after the end of the 60-day settlement period, plaintiffs reserve the right to file its motion on remedy
 7 pursuant to local rules.

8 17. Disclosure of Non-Party Interested Entities or Persons.

9 In a separate filing, Plaintiffs will file their Certification of Interested Entities or Persons
 10 pursuant to Civil Local Rule 3-16. This case involves review of Federal Defendants' alleged failure
 11 to issue regulations governing financial responsibility in connection with the production, storage,
 12 transport, treatment and disposal of hazardous substances. Plaintiffs ask the Court to enjoin Federal
 13 Defendants to initiate and complete such rulemaking as expeditiously as possible. Plaintiffs and
 14 Defendant-Intervenors anticipate that, depending on their content, such rules may substantially
 15 affect the financial interests of persons, firms, partnerships, corporations or other entities producing,
 16 handling or disposing of hazardous substances. Plaintiffs observe that industry representatives have
 17 been granted intervention to protect their interests. The provisions of Civil Local Rule 3-16 do not
 18 apply to any governmental entity or its agencies.

19 Respectfully submitted this 26th day of June 2008.

20
 21
 22 /s/ Lisa Gollin Evans
 23 LISA GOLLIN EVANS
 24 Earthjustice
 25 21 Ocean Avenue
 26 Marblehead, MA 01945
 27 (781) 631-4119
 28 levans@earthjustice.org

JAN HASSELMAN
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
jhasselman@earthjustice.org

*Attorneys for Plaintiffs Sierra Club, Great
Basin Resource Watch, Amigos Bravos, and
Idaho Conservation League*

GREGORY C. LOARIE (CA Bar No. 215859)
Earthjustice
426 - 17th Street, 5th Floor
Oakland, CA 94612
(510) 550-6725
(510) 550-6749 [FAX]
gloarie@earthjustice.org

Local Counsel for Plaintiffs

RONALD J. TENPAS
Assistant Attorney General
Environment & Natural Resources Division

/s/ Lisa Gollin Evans, for *
ROCHELLE L. RUSSELL (CA Bar #244992)
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-1950
(202) 514-8865 [FAX]
rochelle.russell@usdoj.gov

Attorney for Federal Defendants

* per email authorization

* per email authorization

/s/ Lisa Gollin Evans, for *

MICHAEL W. STEINBERG

(Admitted *Pro Hac Vice*)

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 739-3000

(202) 739-3001 [FAX]

msteinberg@morganlewis.com

*Attorney for Intervenors Superfund Settlements
Project, RCRA Corrective Action Project, and
American Petroleum Institute*

BENJAMIN P. SMITH (State Bar #197551)

LAURA A. LEE

Morgan, Lewis & Bockius LLP

One Market, Spear Street Tower

San Francisco, CA 94105

(415) 442-1000

(415) 442-1001 [FAX]

bsmith@morganlewis.com

llea@morganlewis.com

Local Co-Counsel for Intervenors